

48A C.J.S. Judges § 326

Corpus Juris Secundum | August 2023 Update

Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

IX. Disqualification to Act

D. Objections to Judge and Proceedings Thereon

3. Determination of Objection to Judge

§ 326. Disqualification dependent on legal sufficiency of affidavit

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#)  51(4)

Under statutes making disqualification dependent on submission of an affidavit meeting certain requirements, the filing of an affidavit of bias or prejudice does not per se bring about the disqualification, but the court must accept the facts alleged therein as true for the purpose of ruling upon their legal sufficiency.

Under statutory provisions in some jurisdictions requiring allegation of the facts on which disqualification is claimed, the filing of an affidavit with respect to the personal bias or prejudice of the judge whom the party seeks to disqualify does not per se bring about the disqualification.¹ Under such provisions, the judge must accept the facts stated therein as true for the purpose of ruling upon their legal sufficiency, however unfounded they may be in fact.² However, the court need not accept speculation as true³ and is not required to accept the construction placed on the facts by the movant or the affiant.⁴

Good faith.

There is authority that the good faith of the party filing the affidavit may not be questioned or considered by the court in determining the right to a change of judge.⁵ However, it has also been held that where it is apparent that a petition for substitution of judge is not made in good faith but for purposes of delay, the denial of a petition to substitute does not constitute error.⁶

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Footnotes

- 1 U.S.—National Auto Brokers Corp. v. General Motors Corp., 572 F.2d 953 (2d Cir. 1978).
- Haw.—Peters v. Jamieson, 48 Haw. 247, 397 P.2d 575 (1964).
- Ohio—Cuyahoga County Bd. of Mental Retardation v. Association of Cuyahoga County Teachers of Trainable Retarded, 47 Ohio App. 2d 28, 1 Ohio Op. 3d 168, 351 N.E.2d 777 (8th Dist. Cuyahoga County 1975).
- 2 U.S.—Armenian Assembly of America, Inc. v. Cafesjian, 783 F. Supp. 2d 78 (D.D.C. 2011); U.S. v. Bravo Fernandez, 792 F. Supp. 2d 178 (D.P.R. 2011).
- Colo.—Bruce v. City of Colorado Springs, 252 P.3d 30 (Colo. App. 2010).
- Fla.—D.H. ex rel. J.R. v. Department of Children and Families, 12 So. 3d 266 (Fla. 1st DCA 2009).
- Haw.—Arquette v. State, 128 Haw. 423, 290 P.3d 493 (2012).
- Ind.—Pruitt v. State, 903 N.E.2d 899 (Ind. 2009).
- Knowledge of falsity irrelevant**
The rule applies even though the judge passing on the legal sufficiency of the affidavit knows the allegations thereof are false.
- U.S.—Armenian Assembly of America, Inc. v. Cafesjian, 783 F. Supp. 2d 78 (D.D.C. 2011).
- 3 U.S.—U.S. v. Pastor, 419 F. Supp. 1318 (S.D. N.Y. 1975).
- 4 U.S.—Smith v. Danyo, 441 F. Supp. 171 (M.D. Pa. 1977), judgment aff'd, 585 F.2d 83, 26 Fed. R. Serv. 2d 620 (3d Cir. 1978).
- 5 U.S.—Mims v. Shapp, 541 F.2d 415 (3d Cir. 1976).
- Ga.—Braddy v. State, 316 Ga. App. 292, 729 S.E.2d 461 (2012) (overruled on other grounds by, Murphy v. Murphy, 322 Ga. App. 829, 747 S.E.2d 21 (2013)).
- Good faith of counsel**
U.S.—Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497 (D.S.C. 1975).
- 6 Ill.—In re Estate of Wilson, 238 Ill. 2d 519, 345 Ill. Dec. 583, 939 N.E.2d 426 (2010).